SUPREME COURT, U. S.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1968

No. 296

PAUL WALTER PEARCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Paul Walter Pearce, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above styled case on June 17, 1968.

OPINIONS BELOW

No opinions were rendered either by the United States District Court for the Eastern District of Virginia, Norfolk, Virginia, or the United States Court of Appeals for the Fourth Circuit. A memorandum of the United States District Court for the Eastern District of Virginia,

Norfolk, Virginia, entered December 5, 1967, is not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered June 17, 1968. The jurisdiction of the Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

Whether the search without a warrant which produced the evidence leading to the Petitioner's conviction was unlawful and in violation of his rights under the Fourth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was charged in separate two-count indictments with violation of 26 U.S.C. §5601 (a) (12), and violation of 26 U.S.C. §5205 (a) (2) and 5604 (a) (1). (Internal Revenue—removing, concealing and possessing non-tax-paid liquor).

Trial of Petitioner was in the United States District Court, Norfolk Division, on August 2nd, 1967. Trial by jury was waived and the case was heard solely upon the Petitioner's motion to suppress evidence obtained from the search of a pickup truck registered in your Petitioner's name without a search warrant, for a lack of probable cause. This sole issue determined the innocence or guilt of the Petitioner.

The facts surrounding the arrest of the Petitioner are the key to the case. The application of case law and the Constitutional protections of the Petitioner turn solely on the facts.

The Petitioner was arrested on November 9, 1966, while a passenger in a pickup truck, registered in the Petitioner's name, being driven by Charlie Graham Gregory. The vehicle was stopped deliberately and intentionally by Alcohol, Tobacco and Tax Unit Agents. The Agents had been previously notified that the truck had returned from the Eastern Shore of Virginia to the Norfolk area, the notice being in accordance with arrangements with the Chesapeake Bay Bridge-Tunnel Police.

The vehicle was proceeding in a lawful manner at the time it was stopped and no crimes of any nature were committed in the presence of any of the Agents. Without search warrant, the Agents proceeded to search the Petitioner's vehicle and only after opening a door to the truck, four and one-quarter gallons of non-tax-paid liquor were found. Indictments were subsequently obtained.

According to the Agents' testimony at the trial, the following information was available to the arresting offi-

cers. Agent McFarland had received anonymous telephone calls that essentially gave the residence of Charlie Graham Gregory, the fact that he was making whiskey on the Eastern Shore of Virginia and that whenever he drove a pickup truck, registered in your Petitioner's name, from the Eastern Shore to the Norfolk area, with the Petitioner, that the vehicle was carrying whiskey. Deliberate surveillance of the Petitioner and Gregory revealed absolutely no criminal activity whatsoever. Agent Berge had received a call from a Sergeant Thomas of the Chesapeake Vice Squad to the effect that an undivulged informant of unknown reliability had stated that Gregory lived on the Eastern Shore of Virginia, that he drove a truck registered in the Petitioner's name, that Gregory was making whiskey and that whenever the truck returned from the Eastern Shore to Norfolk, it was carrying whiskey. That information was allegedly available at the time of the arrest.

At the conclusion of the trial, the Judge requested memoranda of law and later advised that the testimony of Sergeant Thomas should be taken for the record. By letter of September 18, 1967, the U. S. Attorney informed the trial court that Agent Berge had erred in his identification of Sergeant Thomas and that Sergeant Gary Arnold Barnett was the actual source of his information.

On December 5, 1967, the District Court Judge filed his memorandum denying the Petitioner's motion to suppress the evidence. December 29, 1967, was set for sentencing of the Petitioner.

The trial Court was informed by letter from defense counsel, dated December 20, 1967, that the Petitioner

had been advised that Barnett had not supplied the information alleged by Berge and requested a further hearing at the time of the sentencing.

A further hearing was held on December 29, 1967, at which it was established that Sergeant Thomas had supplied no information to Agent Berge. Sergeant Barnett was the source, but he denied specifically and flatly that any information was given as to the vehicle ever carrying liquor. He did give Berge information as to the license of a truck owned by Petitioner, that Gregory drove it occasionally and a telephone number where Gregory could be reached on the Eastern Shore. Barnett's source was undivulged and of unknown reliability and credibility. Agent Berge persisted in testimony that he obtained the further information of the carrying of whiskey from Barnett although, he, Berge, did not keep any records to indicate the source of any such information. All of the Agents knew that the Petitioner and Gregory were previous violators of whiskey laws.

At the conclusion of the hearing on December 29th, 1967, the Trial Judge reaffirmed his decision over-ruling the Petitioner's motion to suppress the evidence, found the Petitioner guilty, and proceeded to sentence the Petitioner to eighteen (18) months confinement. An Appeal to the Court of Appeals for the Fourth Circuit was duly made.

Argument was heard by the Court of Appeals on May 10th, 1968, and on June 17th, 1968, the Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

The search and seizure in this cause violated the rights of the Petitioner under the Fourth Amendment of the Constitution of the United States as the law enforcement officials had no probable cause to believe a crime was being committed in their presence. There was no search warrant in this case and it has been conceded by all parties that no crime of any type was committed in open view or within the actual observation of the law enforcement officials. (Tr. p. 74, 75). The evidence in this case, four and one-quarter gallons of non-tax-paid liquor, was found only after the search of the pickup truck registered in the Petitioner's name and driven by Charlie Graham Gregory. (Tr. p. 77).

The Alcohol, Tobacco and Tax Unit Agents were unquestionably proceeding under 26 U.S.C. Art. 7603. "Reasonable grounds" recited in the preceding Article has the same meaning as probable cause. *United States* v. *Boston,* 330 F. 2d 937 (2 Cir. 1964) cert. denied 377 U.S. 1004 (1963).

The Government has the burden of proof as to the existence of probable cause in this cause. *United States* v. *Rivera,* 321 F. 2d 704 (2 Cir. 1963); I Crim. L. Bull. 1 (1965). Due to the lack of a search warrant, the burden may require a greater showing of probable cause than in cases involving warrants. The Court's holdings in this regard have been set forth in *United States* v. *Ventresca,* 380 U.S. 102 (1965); *Wong Sun* v. *United States,* 371 U.S. 471, 479-480, (1962); *Beck* v. *Ohio,* 379 U.S. 89 (1964).

Evidence obtained in a search incident to an arrest

made without probable cause may be properly suppressed. Physical restraint is not necessary as arrest is consummated upon stopping a car. *Henry* v. *United States,* 361 U.S. 98 (1959). See also, *United States* v. *Nicholas,* 319 F. 2d 697 (2 Cir. 1963); but cf., *United States* v. *Bonanno,* 180 F. Supp. 71 (S.D.N.Y. 1960). Petitioner's movement was restricted when the ATTU Agent used siren and flashing light to stop the Petitioner's vehicle. (Tr. p. 74). Clearer manifestation of the Petitioner's restriction of liberty was shown when the Petitioner was unable to seek privacy to urinate without accompaniment by an Agent. (Tr. p. 77).

Whether the defendants should prevail in their attempt to exclude the fruits of a search conducted subsequent to this arrest must turn on the nature and quantum of information possessed by the Agents at the time of the arrest. The inquiry must be whether the "facts available to the officers at the moment of arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964).

There was no testimony that any illicit liquor was ever seen by the Agents prior to the arrest or they had any reason *to believe* that an offense was being committed. (Tr. p. 75). The conclusion that a source is reliable may not be conclusory but must be rationally drawn from some related "underlying circumstances." *Aguilar* v. *Texas,* 378 U.S. 108, 114-115 (1964). The Petitioner's pickup truck was stopped, and the Petitioner arrested, while proceeding lawfully on Military Highway in the City of Chesapeake, Virginia. The truck was stopped after ATTU Agents had been notified by the Chesapeake

Bay Bridge-Tunnel Police, under previous instructions, that the truck was returning from the Eastern Shore of Virginia. (Tr. p. 63, 70).

Prior to the arrest the following information was available to the ATTU Agents. First: Agent McFarland testified on August 2nd, 1967, that he had received several anonymous telephone calls to the effect that the Petitioner and Charlie Graham Gregory were operating a still site on the Eastern Shore of Virginia, and certain information as to Gregory's truck and residence. Close surveillance of the Petitioner and Gregory was made on the Eastern Shore. The results were that not one single solitary bit of evidence was obtained as to the commission of any crimes by the Petitioner and Gregory. (Tr. p. 66-74).

Second: That approximately one month prior to Petitioner's arrest, Agent Berge had received a telephone call from a sergeant of the Chesapeake Vice Squad and told that an undivulged informant had stated every time the Petitioner's truck came from the Eastern Shore of Virginia to the Norfolk area with produce, that it was also carrying whiskey. (Tr. p. 84-85). On August 2nd, 1967, Agent Berge testified that the caller was Sergeant John D. Thomas. (Tr. p. 87). The Trial Court was notified by the U. S. Attorney on September 18th, 1967, that Berge had erred in his testimony and that the caller had in fact been a Sergeant Gary Arnold Barnett. On December 29th, 1967, upon further hearing in this cause it was established that Sergeant Thomas had never given any information, in regards to the issue in this cause, to Agent Berge. (Tr. p. 100-102). It was further established at the same time that Sergeant Barnett had called

Agent Berge and given him the license number of a truck registered to the Petitioner, information to the effect that Gregory could be reached at a telephone number on the Eastern Shore and that Gregory drove the truck to Chesapeake occasionally. (Tr. p. 105-108). Sergeant Barnett flatly denied ever giving Agent Berge any specific information that the truck in question carried whiskey. (Tr. p. 106). Agent Berge testified at the same time that Sergeant Barnett was his source although he kept no notes of his conversation. (Tr. p. 114-115). It was also established clearly that Sergeant Barnett's undivulged informant, of whatever information, was of absolutely unknown reliability. (Tr. p. 110).

Thus, at the time of Petitioner's arrest the only information available to the Agents was a series of anonymous telephone calls that produced no criminal information and disputed information from a Vice Squad Sergeant, received in turn from a source of unknown reliability, about which information no records had been kept and the details of which were disputed and contradicted. The only other information available was that the Petitioner and Gregory were past offenders of various liquor laws.

No testimony or corroboration was offered as to the identity or reliability of any informant. No holding that probable cause existed can be predicted on the ultimate reliability of information from anonymous informants or from those whose reliability is unknown, standing alone. *Katz* v. *Peyton,* 334 F. 2d 77 (4 Cir. 1964). There must be substantial basis for crediting hearsay. *Jones* v. *United States,* 362 U.S. 257, 269 (1960). Reliability plus corroboration might be sufficient under the *Katz* v. *Pey-*

ton, supra, but none was shown in the instant case. Mere suspicion of crime, without more, is not sufficient for probable cause.

The mere fact that the Petitioner used a certain highway, as predicted, is not sufficient corroboration as has been clearly shown in *Potter* v. *United States,* 362 F. 2d 293 (5 Cir. 1966). Nor is unspecified information from an unidentified informant plus a knowledge of a previous record of convictions and familiarity with that defendant's appearances, all taken together sufficient to constitute probable cause. *Beck* v. *Ohio,* supra, at p. 96-7.

The facts in this case are almost precisely the same as those in the *Potter* case, supra. The only difference in the informants was that in the instant case the information, the details of which were contradicted by the very source, was passed on by a police officer from an unreliable informant to the arresting officer. Unreliable information does not become reliable simply because it is passed along twice instead of once.

CONCLUSION

To protect the integrity of the many decisions of this Court, to resolve conflicts among decisions of the Federal Appellate Courts, and to protect the Petitioner's rights under the Fourth Amendment of the Constitution of the United States, your Petitioner respectfully requests that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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